

**State of California  
AIR RESOURCES BOARD**

**PROPOSED**

**ENFORCEMENT PENALTIES:**

**BACKGROUND AND POLICY**

**Pursuant to Senate Bill 1402 (Dutton, Chapter 413, Statutes of 2010)**

**Released for Public Comment: February 25, 2011**

## PREFACE

This document has been prepared by the Air Resources Board (ARB) pursuant to Health and Safety Code Section 43024 which was adopted as part of Senate Bill 1402 (SB 1402, Dutton, Chapter 413, Stats. 2010). Section 43024 provides:

*43024. (a) No later than March 1, 2011, the state board shall publish a penalty policy for civil or administrative penalties prescribed under Chapter 1 (commencing with Section 43000) to Chapter 4 (commencing with Section 43800), inclusive, and Chapter 6 (commencing with Section 44200).*

*(b) The policy shall take into consideration all relevant circumstances, including, but not limited to, all of the following:*

- (1) The extent of harm to public health, safety and welfare caused by the violation.*
- (2) The nature and persistence of the violation, including the magnitude of the excess emissions.*
- (3) The compliance history of the defendant, including the frequency of past violations.*
- (4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance.*
- (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.*
- (6) The efforts of the defendant to attain, or provide for, compliance.*
- (7) The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature extent, and time of response of any action taken to mitigate the violation.*
- (8) The financial burden to the defendant.*

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## **EXECUTIVE SUMMARY**

Millions of Californians continue to breathe unhealthful air. Many areas in California exceed health-based air quality standards and cannot tolerate additional, illegal emissions of smog-forming compounds and diesel soot. For many toxic air contaminants, such as benzene and formaldehyde, there are no known safe levels of exposure. There is no practical way Californians can individually protect themselves from air pollution. Children, the elderly and people with heart and lung disease are particularly at risk.

The Air Resources Board approaches this challenge with the conviction that betterment of public health goes hand-in-hand with economic health.

The bottom line of ARB's enforcement program is the same as its overall mission: "To promote and protect public health, welfare and ecological resources through the effective and efficient reduction of air pollutants while recognizing and considering the effects on the economy of the state." The ARB aims to reduce air emissions through fair, consistent and comprehensive enforcement of air pollution laws and by providing compliance assistance.

In 2009, the ARB began to explore ways to improve compliance and make its enforcement process more transparent. Staff solicited public comment in a widely announced Oct. 12, 2009 workshop in Sacramento, which drew a large audience and much participation. Many commenters encouraged ARB to increase the transparency of its enforcement process. The Enforcement Division reported the results of its outreach efforts at the Board's Jan. 28, 2010 meeting and committed to developing a written penalty policy that explains how it resolves violations and determines penalties.

The California Legislature underscored the importance of ARB's enforcement outreach in approving Senate Bill 1402, which became law on Sept. 28, 2010. Appendix A contains a copy of the bill. Among other requirements, SB 1402 directs the ARB to publish by March 1, 2011 a penalty policy that takes certain circumstances into account when assessing penalties. This document responds to that directive.

Part 1 provides context and background for the penalty policy. It outlines California's air pollution laws, regulations and corresponding penalties and details ARB's enforcement program, which includes public outreach and compliance assistance workshops. The handling of penalty revenue also is discussed.

Part 2 is the proposed penalty policy itself and related Cal/EPA guidance documents. The policy calls for consideration of "all relevant circumstances," in determining the penalty amount. By law, penalty levels must be set at levels to

ensure compliance and deter violations. They may be based on any relevant evidence, including a violator's financial condition. Such circumstances, along with the eight factors enumerated in SB 1402 (see Preface), must all be considered in determining penalties for violations of laws under the Board's jurisdiction.

For easy reference, Appendix B of this document presents a matrix of most of the laws and regulations ARB enforces, with the corresponding penalties.

The penalty policy explains how ARB works to consistently reach swift and fair resolution of violations.

Fairness is at the heart of an effective enforcement program—one that benefits those who invested in pollution controls and maintains consistency in the level of penalties issued for similar violations. To be fair, the Board also takes into account the specific circumstances, causes, results and actors—all of which vary from case to case.

As a result, comparisons between individual cases of similar violations may be invalid. Similarly, the policy does not have a mathematical formula for calculating penalties. Such a formulaic approach would not properly weigh individual circumstances and might result in an unjust or ineffective penalty.

Fairness also calls for proportionality, meaning monetary sanctions should be severe enough to deter future violations but proportionate to the financial wherewithal of the company or individuals involved.

ARB's penalty determinations are designed to prevent harm to the public and the environment, not to drive people out of business. Penalties may be reduced in cases of financial hardship. Also, for example, ARB's consumer product regulations commonly provide a "sell-through" period, allowing businesses to sell their remaining inventory of newly prohibited, higher-polluting products for a limited period before enforcement takes effect. The ARB's Enforcement Division generally launches an extensive public outreach campaign with the rollout of a new regulation so the regulated community isn't caught by surprise or misinformed.

The Enforcement Division takes great care to engage regulated industries and businesses in developing, understanding and complying with each regulation it adopts. Over the years, the enforcement staff has grown more specialized and involved in public outreach. The division's compliance assistance workshops annually draw thousands of from small business, industries, local air pollution control districts and other groups. Enrollment more than doubled in 2009 to 9,000.

The ARB resolves thousands of violations a year and annually deposits

millions of dollars in penalties in an Air Pollution Control Fund controlled by the California Legislature.

Over the years, ARB regulations have evolved from focusing almost exclusively on large enterprises such as engine manufacturing and fuel production to medium and small operations. This is particularly the case with enforcement of the Board's diesel risk reduction regulations that affect owners of truck and bus fleets of any size. The Board's strategy for attaining cleaner diesel emission standards traditionally called for accelerated retirement of older, higher polluting diesel trucks and buses. Recent regulations, however, also require fleet operators to retrofit certain model years of higher-polluting diesel vehicles and equipment that are still years away from retirement. There are more than 500,000 heavy-duty diesel trucks on California's roads today.

Enforcement also has grown more active. The number of cases or citations closed in 2009 totaled 4,054, compared with 1,535 in 2002. Penalties collected in 2009 totaled \$16.3 million, up from \$11.3 million collected in 2002. For more enforcement statistics, please visit the ARB Enforcement Division website at: <http://www.arb.ca.gov/enf/enf.htm>.

ARB's enforcement process can be summarized in five steps: (1) finding violations through inspections, investigations or complaints, (2) determining the penalty, (3) notifying the responsible party, (4) providing the responsible party an opportunity to explain and ask questions and (5) resolving the violation informally if possible. These steps may vary, depending on the type of violation.

When a settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or criminal prosecution if warranted. Administrative hearings may be held for certain mobile source citations.

The proposed penalty policy fulfills the requirements of SB 1402. The policy extends ARB's practice of explaining the basis of its penalty determinations to include more details in its written demands for a penalty or settlement, as SB 1402 requires. Those details include the governing law and a quantification of excess emissions where practicable.

The policy also formalizes the Board's longtime penalty-setting practice of taking into consideration "all relevant circumstances," including the eight SB 1402 factors. Those factors include the extent of public harm caused by the violation and the defendant's compliance history and level of cooperation in the investigation.

ARB's efforts to improve the transparency of its enforcement process go beyond the fulfillment of SB 1402's requirements. For example, ARB now posts online all settlement agreements, complete with explanations of penalty determinations.

The Board looks forward to working with the interested public and regulated community on refining the proposed penalty policy in public workshops and in response to public comments later in 2011.

## **PART 1: BACKGROUND ON ARB ENFORCEMENT**

### **I. INTRODUCTION**

To fully understand ARB's penalty policy, it is important to understand the Board's overall mission, goals, environmental justice policies and enforcement program.

#### **A. Mission**

- To promote and protect public health, welfare and ecological resources through the effective and efficient reduction of air pollutants while recognizing and considering the effects on the economy of the state.

#### **B. Major Goals**

- Provide healthful air to all Californians
- Protect public from exposure to Toxic Air Contaminants
- Reduce California's emission of greenhouse gases
- Provide leadership in implementing and enforcing air pollution control regulations
- Provide innovative approaches for complying with air pollution regulations
- Base decisions on best possible scientific and economic information
- Provide quality service to the public

#### **C. Environmental Justice Policies**

ARB is committed to making the achievement of environmental justice an integral part of its activities. State law defines environmental justice as the fair treatment of people of all races, cultures, and incomes with respect to the development, adoption, implementation and enforcement of environmental laws, regulations, and policies.



The Board approved its Environmental Justice Policies and Actions on Dec. 13, 2001, consistent with the directives of state law. They are available at <http://www.arb.ca.gov/ch/programs/ej/ej.htm>

#### D. ARB's Enforcement Program

The ARB designed its enforcement program to achieve immediate compliance, deter future violations and to make sure that people who follow the rules are not disadvantaged by those who don't.

ARB resolves several thousand violations a year through a swift and informal settlement process and annually deposits several million dollars in penalties in an Air Pollution Control Fund that is controlled by the California Legislature.

When a settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or to a District Attorney if criminal prosecution is warranted. Administrative hearings are available for some of ARB's cases.

ARB's regulations have become increasingly complex and have reached larger and more diverse industrial and business sectors. Consequently, the need to provide compliance assistance and a clear enforcement policy has become more critical.

## II. LEGAL FRAMEWORK

### A. Laws and Regulations

The Air Resources Board enforces a variety of laws and regulations to stop illegal air pollution. The statutes are found in the **California Health and Safety Code (HSC)**, which recognizes air pollution sources as either "vehicular" or "non-vehicular."

- **Vehicular:** cars, trucks and other motorized mobile sources.
- **Non-vehicular:** stationary sources such as oil refineries, factories, dry cleaners and auto body shops. Such sources include "consumer products," meaning chemically formulated products for household or institutional use. Regulated products include cleaning compounds, aerosol paints, perfumes and other personal care products.

Most of the air quality statutes the ARB enforces are in HSC's **Division 26**, which is divided into five **Parts**. Division 26 gives the ARB responsibility for control of vehicular sources. It allocates primary control of the non-vehicular sources to the **local air pollution control districts**, which are subject to ARB

oversight. ARB regulations are in **Titles 13 and 17** of the **California Code of Regulations (CCR)**.

For easy reference, Appendix B of this document presents a matrix of most of the laws and regulations ARB enforces, with the corresponding penalties.

## **B. Regulations**

In proposing an air pollution regulation, ARB staff documents why it is needed, inventories the sources of emissions and their contribution to the problem and surveys existing control options. ARB then publicly issues a draft regulatory proposal, solicits comments from various stakeholders and refines the proposal based on those comments. The staff contacts stakeholder groups – typically representatives from industry, the environmental community and public health professionals – and holds public workshops. The goal of this iterative process is to resolve as many stakeholder issues as possible before staff presents the proposed regulation to the Board for adoption. ARB follows the same steps when a regulation requires re-evaluation and amendment. After regulations are adopted, ARB expends considerable efforts to help the affected industry comply with it.

## **C. Penalties**

California's air quality laws and regulations apply the legal doctrine of “**strict liability**,” meaning a prohibited act constitutes a violation no matter one's intent or the amount of care taken to avoid violations. Under strict liability, the circumstances of a violation are taken into account to determine the appropriate penalty, not to excuse the violation. The doctrine is common to environmental laws nationwide (including the federal Clean Air Act), because pollution violations occur in the course of ongoing business activity and usually are not committed intentionally or even negligently. In some cases, higher maximum penalties are available for intentional or negligent violations. But without strict liability, air pollution laws would have little deterrent effect.

**Maximum** penalties are specified for each type violation:

### **□ Stationary Sources, Consumer Products and AB 32 Penalties (Part 4 of Division 26, HSC)**

There are civil penalties (sections 42401 through 42403) and criminal penalties (sections 42400 through 42400.8). Violators may be punished using either, but not both (section 42400.7). Most violations are punished civilly.

Maximum penalty amounts are based on the degree of a violator's intent. The range begins at \$1,000 per violation per day, which can be imposed with no finding of intent (strict liability). Penalties top at \$1 million per violation per day for corporate violators and \$250,000 per violation per day for individuals, in cases of willful and intentional emissions of air contaminants that result in great bodily

harm or death. ARB also can obtain a court order or “injunction” to stop violations from taking place (section 41513). In criminal cases, violators also face possible jail sentences of 30 days to 1 year per violation per day.

Part 4 penalty provisions also apply to violations of ARB’s consumer products regulations (Title 17, California Code of Regulations, sections 94500-94575), indoor air cleaner regulations (sections 94800-94810) and any requirement ARB adopts under Assembly Bill 32 (AB 32), the California Global Warming Solutions Act of 2006 (Chapter 488 Statutes of 2006).

The list of factors that must be considered in determining a penalty under Part 4 (section 42403) is similar to those required under SB 1402 (section 43024).

□ **Air Toxics Penalties (Part 2 of Division 26, HSC)**

ARB enforces state and some federal Air Toxic Control Measures (ATCMs) under section 39674 of Part 2. That section provides for penalties of up to \$10,000 per violation, per day. Higher penalties may also apply because certain ATCMs may also be enforced under section 39675 provisions of Part 4, stationary sources, described above. Because the regulations ARB adopts to control diesel particulate matter are in part adopted pursuant to ARB’s authority to control air toxics, violations of the ARB’s diesel retrofit regulations, for example, may also carry penalties under Health and Safety Code sections 39674 and 39675.

□ **Mobile Sources and Fuels Penalties (Part 5 of Division 26, HSC)**

Unlike Part 4, Part 5 relies almost exclusively on civil penalties. Transactions involving new motor vehicles that are not certified to ARB’s emission standards are subject to civil penalties of up to \$5,000 per vehicle per violation (section 43154). These are the hallmark penalties that safeguard ARB’s stringent motor vehicle emission standards. They were upheld in *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4th 1332, which rejected many of the legal challenges to ARB’s ability to enforce its vehicle certification programs.

Other requirements carrying specific penalties for violations selling vehicles that violate ARB’s emission standards [\$5,000 per vehicle (section 43211)], violating ARB test procedures [\$50 per vehicle (section 43212)] and tampering with pollution control devices (\$1,000 per violation for car dealers (section 43012)).

There’s a “catchall” provision (section 43016) for violations of requirements that do not carry a specific penalty. It provides for penalties of up to \$500 per violation and is commonly applied to violations of the Small Off-Road Engine regulations (Title 13 CCR sections 2400-2409).

The SB 1402 penalty factors now formally apply to mobile source violations. Section 43031 applies a similar list of factors to violations of ARB's fuels regulations.

As for ARB's fuel regulations, willful violations are subject to civil penalties of up to \$250,000 per day, plus removing any economic benefit. Negligent violations are subject to penalties of up to \$50,000 per day, while strict liability violations are subject to penalties of up to \$35,000 per day (sections 43027 and 43030.)

It is a criminal offense to knowingly violate an ARB fuels regulation (section 43020). The misdemeanor is punishable by up to \$1,000 per day of violation and a maximum six months jail time.

ARB can obtain a court order to stop any violation of a Part 5 requirement from occurring (section 43017).

### **III. ARB's ENFORCEMENT PROCESS**

#### **A. Finding the violation**

ARB learns about violations through inspections, tips from the public, referrals from other agencies, mandatory emissions reporting and voluntary disclosure. How ARB learns about a violation may make a difference in how it calculates the penalty. Concealing violations, for example, may result in a maximum penalty.

#### **B. Determining the penalty**

When it finds a violation, ARB determines a proposed penalty amount based on applicable laws and court decisions. The penalty amount may be adjusted based on other relevant circumstances, such as the violator's financial position and history of violations. In some cases, each item (say a vehicle or piece of equipment that is not certified to ARB emission standards) triggers a penalty. In other situations, each day a violation continues is a separate violation.

#### **C. Notifying the responsible party**

Every person ARB believes has violated a law is notified. The notice may be a citation issued (say on a roadside inspection of big rig truck with smoking exhaust), in a letter informing the person of an apparent violation or in a more formal "Notice of Violation." In rare cases, the first notice will be a legal pleading requiring a response and appearance in court to face charges. No matter the form, all notifications contain the information required by SB 1402. ARB explains the basis for any penalty it demands, and violators may request a reduced

penalty based on mitigating circumstances ARB had previously not known about. Likewise, written demands explain:

- Laws or regulations on which the penalty is based.
- How the penalty amount was determined, including mitigating or aggravating factors.
- The penalty's per unit basis, if any.
- Whether the law violated specifies emission limits, and if so, a quantification of excess emissions where practicable (Health and Safety Code section 39619.7).

#### **D. Opportunity to discuss**

Everyone ARB notifies of violating any law or regulation is given one or more opportunities to explain the circumstances and to ask about the basis of the accusation. Depending on the seriousness and scope of the violations, the discussion may be a phone call, meetings with ARB staff or an exchange of correspondence. These discussions are a two-way street. The ARB seeks to confirm and learn more about the violations, while the violator may want to explain that no violation occurred or outline points that could lower the penalty.

#### **E. Resolution**

Most violations are quickly resolved when the violator mails in a fine or negotiates a settlement by phone or in person. Violations that are disputed sometimes require more information gathering and discussion before an agreement is reached.

When a settlement cannot be reached, ARB generally refers the matter to a prosecutor, usually the Attorney General, for civil litigation or criminal prosecution if warranted. In most cases, ARB has discretion whether to initiate an administrative hearing prior to litigation. Given its success in obtaining mutually agreeable settlements, ARB has had little need for these administrative hearings.

### **IV. PUBLIC COMMUNICATIONS AND OUTREACH**

ARB issues press releases announcing its settlements in cases involving large penalties. All settlement agreements complete with explanations of penalty determinations are posted online at: <http://www.arb.ca.gov/enf/casesett/casesett.htm>. In addition, ARB publishes a detailed report of its enforcement activities each year at: <http://www.arb.ca.gov/enf/reports/reports.htm>.

Much effort goes to engage regulated industries and small businesses in developing, understanding and complying with each regulation it adopts. Staff

widely broadcasts enforcement advisories, maintains web pages and list-serves on regulatory developments, distributes brochures and fact sheets, publishes articles in trade journals and regularly responds to public inquiries.

ARB's Office of the Ombudsman specializes in helping owners of small businesses and start-ups navigate permitting, resolve compliance issues and find financial assistance and incentive programs.

Over the years, ARB's enforcement staff has offered compliance assistance workshops for thousands of people from industry, small business, academia, local air districts and other groups. Enrollment more than doubled in 2009 to 9,000.

## **V. PENALTY REVENUE**

ARB staff records penalty checks then deposits them into the Air Pollution Control Fund, which is administered by the California Legislature. Money in the fund must be appropriated by the Legislature before it can be spent.

Some cases are resolved by paying part of the penalty (not to exceed 25 percent) to a Supplemental Environmental Project as described in Appendix D.

## **VI. DEVELOPING AN ARB PENALTY POLICY**

In 2009, the Enforcement Division began to explore ways to improve compliance and better assist a growing regulated community that faces increasing complex air pollution laws and regulations.

In the largest listserve broadcast in ARB history, staff announced an Oct. 12, 2009 public workshop to discuss enforcement policy. See: <http://www.arb.ca.gov/enf/meetings/meetings.htm> Staff followed up with hundreds of phone calls to a wide spectrum of people interested in ARB's enforcement. The workshop drew a large attendance and wide participation. Many commenters expressed support for ongoing enforcement outreach and encouraged ARB to increase the transparency of its enforcement process.

The Enforcement Division reported the results of its outreach efforts at the Board's Jan. 28, 2010 meeting and committed to developing a penalty policy in consultation with stakeholders.

As ARB conducted its enforcement policy discussions, the Legislature considered SB 1402. The version of SB 1402 enacted and signed into law (see Appendix A) requires ARB to publish a penalty policy by March 1, 2011 that is applicable to specified vehicular air pollution violations. (See Health and Safety Code section 43024.)

This document responds to that directive. Because the principles governing ARB's penalty calculations are common across ARB's programs program (see Health and Safety Code sections 42403, 43024 and 43031), the policy is designed to apply to all the programs the ARB enforces.

ARB solicits comments and plans to hold a public workshop on its proposed penalty policy in March, 2011.

## **PART 2: ENFORCEMENT PENALTY POLICY**

### **VIII. ARB CONSIDERS ALL RELEVANT CIRCUMSTANCES IN ASSESSING PENALTIES INCLUDING EIGHT STATUTORY FACTORS**

#### **A. Introduction**

Health and Safety Code section 42403, 43024 and 43031 require that penalties "shall take into consideration all relevant circumstances, including, but not limited to," eight specified factors. This analysis must account for legal authorities that provide that penalty levels must be set at levels to ensure compliance and deter violations, that penalties may be based on any relevant evidence, and must relate to violators' financial condition. It also requires recognition that, as the Legislature has declared, air quality laws protect the public health and welfare. These circumstances, along with the eight factors enumerated in Health and Safety Code sections 42403, 43024 and 43031 must all be considered in calculating penalties. Cal/EPA has published guidance documents on penalty-related topics, one on self-disclosure of violations (attached as Appendix C) and the other on supplemental environmental projects (attached as Appendix D). These guidance documents and ARB mission statements are also relevant circumstances that ARB considers in calculating penalties. They are discussed at the end of this section.

#### **B. General Penalty Principles**

A penalty's ultimate purpose is to promote compliance with the law. The Legislature determines the appropriate penalty in the first instance by establishing an amount in statute, based on the environmental and health values that the Legislature sought to protect against a particular violation. Many statutes provide for penalties "not more than" the maximum, giving courts and ARB some discretion to reduce the maximum amount. The circumstances of individual cases may or may not provide reasons to reduce penalties below the maximum.

Three key principles guide penalty determinations: the need for deterrence, fairness, and swift correction of environmental problems. ARB

typically exercises its discretion by considering the circumstances of the particular violation, past penalties in similar cases, and the potential costs and risk associated with litigating particular violations.

**Deterrence.** To achieve the goal of deterrence, every penalty must impose a consequence that will deter both the violator and others from future violations. In keeping with that goal, an adequate penalty must deprive a violator of any economic benefit resulting from the violation and include an additional amount reflecting the seriousness of the violation. In many cases, the amount of any economic benefit may be smaller than the proposed penalty, difficult to calculate, or both. Accordingly, ARB does not routinely calculate a precise economic benefit amount unless the facts suggest that such benefit is significant or easily determined.

**Fairness.** To treat the regulated community fairly requires both consistency and flexibility. Treating similar situations similarly is key to fairness. The consideration of each case must be flexible enough to reflect legitimate differences between violations.

**Swift Resolution.** The third key goal is swift resolution of both environmental problems and pending cases. Prompt resolution of disputes limits environmental harm, promotes good environmental practices and enhances a penalty's deterrent effect.

### **C. General Legal Considerations in Calculating Penalties**

The determination of an appropriate penalty depends on the purpose and meaning of the particular statute, and is informed by the larger statutory scheme and case law.

The statutes establishing penalties for violations of ARB program requirements are discussed above and listed in the matrix in Appendix B. In some statutes the Legislature carefully distinguished between intentional conduct, knowing failure to correct a violation, negligence, and strict liability, setting forth different maximum penalties for each.<sup>1</sup> Accordingly, when determining a penalty for an intentional violation subject to the penalty set forth in section 42402.3, for example, it may be inappropriate to automatically consider intent as an aggravating factor. Conversely, the absence of intent may not be a significant mitigating factor for strict liability violations. Many of the penalty statutes the Air Resources Board applies were adopted decades ago. To maintain the deterrent effect the Legislature intended at the time these statutes

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<sup>1</sup> Compare Health and Safety Code sections 42402 [\$10,000 strict liability], 42402.1 [\$25,000 negligence], 42402.2 [\$40,000 knowing], 42402.3 [\$75,000 intentional]. See also Health and Safety Code section 43027, subd. (a) [\$250,000 intentional], (b) [\$50,000 negligent], and (c) [\$35,000 strict liability].



were adopted, current penalties are appropriately set toward the maximum ranges the statutes provide.

Case law interpreting penalty statutes also informs the meaning and operation of penalty provisions. Those cases uniformly note that the purpose of penalties is to punish and deter violations. California courts, like federal courts interpreting the federal Clean Air Act, have stated that the statutory maximum is the presumptive starting point, subject to reductions based on mitigating factors a violator can establish. These cases are discussed in more detail below, but it is important to note the reason for air quality laws in the first place—to protect public health and safety—and acknowledge that this also weights the calculation toward substantial penalties.

#### **D. Air Quality Laws Protect Public Health and Safety**

Calculating penalties for violations of California air quality laws must account for the fact that these laws protect the public health, safety and welfare of all Californians. The Legislature declared this in Health and Safety Code section 39000, which provides:

“The Legislature finds and declares that the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the atmosphere, thereby creating a situation which is detrimental to the health, safety, welfare, and sense of well-being of the people of California.”

The important public policy interests involved in air quality cases justify substantial penalties for violations. Many areas in California fail to attain ambient air quality standards and cannot tolerate additional, illegal emissions. In the case of toxic air contaminants, there are no known safe exposure thresholds. There is no practical way for people to protect themselves from air pollution, so air quality violations must be prevented wherever possible.

#### **E. All Relevant Evidence is Considered in Calculating Penalties**

As provided in SB 1402 and elsewhere, the proper penalty amount is an issue that can be proven by any relevant evidence. (See: Health and Safety Code section 42403, 43031 and 43024; Evidence Code section 350.) “Relevant evidence” is a very wide term and means any evidence that would be admissible in court and has a tendency to prove what the proper penalty should be. (See: Evidence Code sections 210 and 350.)

## **F. General Case Law on Civil Penalties**

Courts have not interpreted most of the air quality penalty provisions in the Health and Safety Code, but they have considered other civil penalty statutes. These courts have recognized that civil penalties have several purposes: punishment, deterring future violations, motivating compliance, and preventing unjust enrichment and unfair business advantage.

For example courts have said a civil penalty is “unquestionably intended as a deterrent against future misconduct and does constitute a severe punitive exaction by the state....” (*People v. Superior Court (Kaufman)* (1974) 12 Cal.3d 421, 431.) Civil penalties “do partake of the nature of punishments for wrongdoing [,] accomplish a chastisement of the wrongdoer and act as a deterrent against similar misconduct” by the violator and others. (*People v. Superior Court (Kardon)* (1973) 35 Cal.App.3d 710, 713.) “[C]ivil penalties may have a punitive or deterrent aspect, [but] their primary purpose is to secure obedience to statutes and regulations imposed to assure important public policy objectives.” (*Kizer v. County of San Mateo* (1991) 53 Cal.3d 139, 147-148 [279 Cal.Rptr. 318] cited in *City and County of San Francisco v. Sainez* (2000) 77 Cal.App.4<sup>th</sup> 1302, 1315 [92 Cal.Rptr. 418].

## **G. Case Law on Air Quality Penalties**

The concepts developed in civil penalty cases in other contexts have been applied to California air quality law. Discussing the civil penalties provided in Health and Safety Code section 43154 for violations of California’s vehicular air quality certification requirements, the court in *People ex rel. State Air Resources Board v. Wilmshurst* (1999) 68 Cal.App.4<sup>th</sup> 1332, explained at page 1351 that when air quality violations occur, maximum penalties are presumed and the violator has the obligation to demonstrate that a lesser penalty amount is appropriate:

“In addition to disgorging illicit gains and obtaining recompense, a civil penalty also has the purpose of deterring future misconduct. (*State of California v. City & County of San Francisco* (1979) 94 Cal.App. 3d 522, 531 [156 Cal.Rptr. 542]; *People v. Bestline Products, Inc.* (1976) 61 Cal.App.3d 879, 924 [132 Cal.Rptr. 767].) Regulatory statutes would have little deterrent effect if violators could be penalized only where a plaintiff demonstrated quantifiable damages. (*State of California v. City & County of San Francisco*, *supra*, 94 Cal.App.3d at p. 531.) Further, “A penalty statute presupposes that its violation produces damages *beyond that which is compensable*.” (*Ibid.*, italics added.) The burden of proving that actual damages are less than the liquidated maximum

provided in a penalty statute lies with the defendant, and in the absence of evidence in mitigation a court is free to assess the full amount. (*Id.* at pp. 531-532.)”<sup>2</sup>

#### **H. Penalties Must Also Relate to the Violator’s Financial Condition**

To accomplish their intended goals, civil penalties must bear some relationship to the violator’s financial condition. The relevance of a violator’s financial information was established in *People v. Toomey* (1985) 157 Cal.App.3d 1, 24-25. In *Toomey* the court reiterated the holding in *People v. Superior Court (Kardon)* (1973) Cal.App.3d 710, 713, that civil penalty provisions are sufficiently similar to exemplary damages as to permit discovery of a violator’s financial condition. The *Kardon* court explained the necessity of financial information: “a relatively small penalty might suffice for the small operator, while the same penalty would be paid with little hurt by the wealthy one” (*Kardon*, at p. 713.) More recently, the court observed in *City and County of San Francisco v. Sainez*, *supra*, at p. 1319:

“Accordingly, we hold that, as in the case of substantive due process protection against excessive punitive damages awards, substantive due process protection against civil penalties under the rationale of *Hale* and *Kinney* allows inquiry into a defendant’s full net worth, not just the value of the particular property at issue in the case.”

Applying this holding, the *Sainez* court upheld a civil penalty that totaled 28.4 percent of the violators’ net worth and 120 percent of the illegal rents they charged. The court took note of *U.S. v. Lippert* (8<sup>th</sup> Cir. 1998) 148 F.3d 974, 976, 978 where “[a] net worth of about \$500,000 has been held enough ability to pay to uphold a penalty of \$353,000....”

Accordingly, a violator’s financial condition always is relevant to determining an appropriate penalty and ARB takes it into account. Health and Safety Code section 42403 mentions it in relation to determining civil penalties

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<sup>2</sup> Similarly, courts calculating Clean Air Act (CAA) and Clean Water Act (CWA) fines often start with the maximum penalty. (*United States v. Dell’Aquila* (3d Cir. 1998) 150 F.3d 329, 338 [CAA]; *United States v. B & W Inv. Properties* (7th Cir. 1994) 38 F.3d 362, 368 [CAA]; *Atlantic States Legal Foundation, Inc. v. Tyson Foods, Inc.* (11th Cir. 1990) 897 F.2d 1128, 1137 [under CWA “the point of departure for the district court should be the maximum fines for such violations”]; *United States v. Midwest Suspension & Brake* (E.D. Mich. 1993) 824 F. Supp. 713, 735 [CAA]; *United States v. Hoge Lumber Co.* (N.D. Ohio 1997) Case No. 3:95CV7044, 1997 U.S. Dist. LEXIS 22353 [CAA]; *U.S. v. Vista Paint Corp.* (C.D.Cal.1996) 1996 WL 477053, 1996 U.S. Dist. LEXIS 22129, \*27 [CAA calls for top-down approach starting with the maximum].)

for violations of ARB requirements adopted pursuant Part 4 of Division 26 of the Health and Safety Code. SB 1402 made it expressly applicable to Part 5 or mobile source violations via the new Health and Safety Code section 43024.

## **I. SB 1402's Statutory Factors**

Several enforcement provisions in statutes implemented by ARB set forth considerations pertinent to determining the penalty amount to be assessed or recovered in settlement. Health and Safety Code sections 42403, 43024, and 43031 require consideration of "all relevant circumstances, including but not limited to" eight separate, but somewhat interrelated, factors. Because the eight factors are nearly identical in those three statutes, this Policy focuses on the wording found in SB 1402's section 43024. However, as provided in SB 1402 and ARB's other penalty assessment statutes, penalty calculations must be made in consideration of the totality of the circumstances, both factual and legal, not just be based on the non-exclusive list of factors the penalty assessment statutes enumerate.

In Health and Safety Code section 43024, SB 1402 provides that penalties "shall take into consideration all relevant circumstances, including, but not limited to, all of the following:

- (1) The extent of harm to public health, safety, and welfare caused by the violation.
- (2) The nature and persistence of the violation, including the magnitude of the excess emissions.
- (3) The compliance history of the defendant, including the frequency of past violations.
- (4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance.
- (5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.
- (6) The efforts of the defendant to attain, or provide for, compliance.
- (7) The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation.
- (8) The financial burden to the defendant."<sup>3</sup>

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<sup>3</sup> Health and Safety Code section 42403 is very similar, as is section 43031, pertaining to fuels violations. Instead of "financial burden to the defendant," section 43031 subd. (b)(8) sets forth the eighth factor as follows: "For a person who owns a single retail service station, the size of the business." Because the "financial burden" of paying a penalty will depend in large part on the "size of the business," the two formulations are conceptually very similar. To the extent there is any difference, we note that the financial burden on a defendant or the size of any enterprise may constitute a "relevant circumstance" under any of the statutes.

## **J. The Penalty Factors Explained**

The factors in SB 1402 and ARB's other penalty assessment statutes can affect a penalty determination in either direction. Applying the factors in any particular case involves a weighing process because the factors are somewhat vague and seldom command a particular penalty in any case. Although no circumstance allows a penalty to exceed the statutory maximum, a violation that involves public harm, illegal emissions, repeat violations, intent, impact on a particular regulatory program, unfair business advantage or similar factors, may justify a penalty at or near the maximum penalty, despite the presence of other mitigating factors. As case law provides, penalty calculations must start at the maximum but can be mitigated, if possible, down from there. The burden is on the violator to make the case for mitigation.

Each of Health and Safety Code section 43024's eight factors are discussed below. Based on experience, some of the most common considerations in penalty calculations are whether the penalty is set at a level sufficient to discourage violations, illegal emissions, the violator's financial condition and his or her compliance history and cooperation with the investigation.

- (1) "The extent of harm to public health, safety, and welfare caused by the violation" refers to injury to air quality, property, persons, or the implementation of an air quality regulation. In cases involving vehicles, engines, pieces of equipment, fuels or products not certified to ARB's air quality standards, the emissions from these illegal units are illegal and excess as well. These types of violations undermine ARB's emission standards, the lynchpin of the emission reductions achieved under ARB's regulations. Since acquiring the data necessary to quantify these illegal emissions (when it exists at all) can be time consuming and expensive, ARB makes these calculations where practicable in accordance with SB 1402 (see: Health and Safety Code section 39619.7). Whether quantifiable or not, wherever there is a violation of a requirement ARB is charged with enforcing and there are emissions to the air, the violation involves illegal, excess emissions. Removing illegal units from the state is very difficult.
- (2) "The nature and persistence of the violation, including the magnitude of the excess emissions" refers to the type of illegal conduct, quantity and type of pollutant, length of time the violation extended over, as well as the considerations discussed under factor (1).
- (3) "The compliance history of the defendant, including the frequency of past violations" refers to whether defendant has had environmental violations within the past several years. Because penalties are imposed to deter violations and motivate compliance, a repeat violation indicates that the prior penalty was inadequate and should be augmented. If the prior

violations are closer factually or temporally to the present one, this argues for a higher penalty augmentation. The absence of prior violations may argue for mitigating the penalty.

- (4) “The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance” refers to acts, including installation, operation or maintenance of equipment, to comply, and systematic attempts to prevent or promptly identify and correct violations. It does not refer to actions required by a permit, the rules, or the normal standard of care.
- (5) “The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods” refers to creative methods or unusual efforts to comply that should be encouraged, even if not entirely successful as well as the accuracy of test methods used to determine violations. This factor does not refer to efforts that are common in an industry.
- (6) “The efforts of the defendant to attain, or provide for, compliance” is related to factor (4) and refers to actions taken *prior to* the violation to ensure compliance.
- (7) “The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation” refers to actions taken *after* a violation is detected. Cooperation with the investigation includes providing information on the violation in a complete and timely manner. Mitigation includes improvements to prevent future violations. A mere return to compliance is not mitigation. A special policy applies to self-disclosed violations discovered through a systematic audit process: Cal/EPA’s October 2003 “Recommended Guidance on Incentives for Voluntary Disclosure.” That Guidance is designed to encourage “regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements through the use of routine, systematic application of an environmental compliance auditing program.” It defines the terms “environmental audit” and “gravity based penalties,” provides incentives to conduct environmental audits and self-disclose violations, and lists conditions that must be met for the Guidance to apply. For more information, the Cal/EPA Guidance is discussed in greater detail below and is attached as Appendix C. The criteria that Guidance contains can be difficult to meet in certain cases. The ARB considers reducing penalties for self-disclosures that do not meet all of the Guidance criteria.
- (8) “The financial burden to the defendant” refers to the burden of the penalty to the violator in terms of continued viability of business, fraction of assets,

revenues, gross income, or income represented by the portion of the penalty in excess of any economic benefit. Proposed penalties may be adjusted for financial burden only after a defendant adequately reveals its finances for recent years. Special case law has been developed to deal with financial issues and is discussed above.

## **K. Penalty Reductions under the California Environmental Protection Agency Voluntary Disclosure Guidance**

Penalties may be reduced under the Cal/EPA Voluntary Disclosure guidance. The criteria the Guidance contains can be difficult to meet in certain cases. The ARB considers reducing penalties for self-disclosures that do not meet all of the Guidance criteria.

### **i. Introduction**

The California Environmental Protection Agency (Cal/EPA) issued its "Recommended Guidance on Incentives for Voluntary Disclosure" in October of 2003. It is attached as Appendix C. This Guidance is designed to encourage "regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements through the use of routine, systematic application of an environmental compliance auditing program." The Guidance **defines** the terms "environmental audit" and "gravity based penalties", provides **incentives** to conduct environmental audits and self-disclose violations and lists **conditions** that must be met for the Guidance to apply.

### **ii. Voluntary Disclosure Guidance-Definitions**

"Environmental Audit" is a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

"Gravity based penalties" are that portion of a penalty over and above the economic benefit gained by noncompliance, whether or not they are labeled that way. In other words, the punitive portion of the penalty is the gravity based part.

### **iii. Incentives-Why a Company Would Do Environmental Audits**

The major incentives to encourage self-audits, prompt disclosure, and correction may include: significantly reducing or not seeking gravity based civil penalties, declining to refer for criminal prosecution companies that self-report, and refraining from routine requests for audits.

#### **iv. Conditions FOR A Voluntary Self-Disclosure to Reduce Penalties**

1. The violation was discovered through an environmental audit or other objective, documented, **systematic** procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations.
2. The violation was discovered **voluntarily** and not due to a legal mandate.
3. The disclosure must be **prompt** and in writing, no more than 21 days after the violation is discovered.
4. The disclosure must be **independent**, meaning it is not made in reaction to a pending government enforcement action or third party complaint.
5. The violation was **corrected immediately**.
6. The violator agrees to **prevent recurrences**.
7. The violation (or similar violation) must not have occurred at the same facility within the past three years.
8. The violation is **not serious**, meaning it did not cause actual harm, present an imminent or substantial endangerment to, human health or the environment, or violate the specific terms of any judicial or administrative order, or consent agreement.
9. The violator **fully cooperated** with the regulatory agency.

Note: Nothing in this modifies the Cal/EPA "Recommended Guidance on Incentives for Voluntary Disclosure," dated October of 2003.

#### **L. Penalty Allocations under the California Environmental Protection Agency Supplemental Environmental Projects Guidance**

Some cases may be resolved by paying part of the penalty (not to exceed 25 percent) to a supplemental environmental project, provided that the criteria of the Cal/EPA Supplemental Environmental Projects Guidance are met.

##### **i. Introduction**

The California Environmental Protection Agency (Cal/EPA) issued its "Recommended Guidance on Supplemental Environmental Projects (SEP)" in October of 2003. It is attached as Appendix D. This Guidance notes that,



“Although SEPs may not be appropriate in all instances, they can play an important [role in] . . . an effective enforcement program.”

The Guidance:

- **defines** the term “SEP”;
- lists **legal guidelines** for and **categories** of SEPs;
- discusses the **proper ratio** between **SEP funds** and penalty funds in settlements; and,
- counsels that all SEPs should be **well-defined** and **implementable**.

SEPs are “environmentally beneficial projects that [an alleged violator] agrees to undertake in settlement of an enforcement action, but which the [alleged violator] is not otherwise legally required to perform.” For example, the funds an alleged violator expends to come into compliance are not properly considered part of a SEP, but funds the same entity might expend to reduce emissions below regulatory requirements could be considered a SEP.

## ii. Guidelines for SEPs

ARB has broad discretion in settling cases, including the discretion to include SEPs as part of its settlements. Nevertheless, SEPs must further the statutory goals of ARB and cannot violate public policy. The Cal/EPA SEP Guidance contains the following elements to ensure that these requirements are met.

- SEPs must be **consistent** with ARB’s underlying statutes and **advance** at least one of the objectives of the statutes involved in the enforcement action.
- SEPs must have an adequate **nexus** with ARB’s enforcement responsibilities, i.e., reduce the environmental or health impact of the violation or the likelihood that such a violation will reoccur.
- SEPs must be **clearly defined**.
- SEPs should **not directly benefit the alleged violator**. For example, a SEP that funds the purchase of products manufactured by the alleged violator would be inappropriate.

Categories of SEPs include: environmental compliance promotion, enforcement projects, emergency planning, pollution prevention/reduction, environmental restoration/protection, public health or any other projects that are consistent with the Guidance. Two types are not allowed: general educational or public environmental awareness projects and projects unrelated to environmental protection. Such projects lack a nexus with the laws involved in ARB enforcement actions, would not advance the goals of ARB’s programs and may directly benefit the alleged violator.

### **iii. Proper Ratio of SEP Funds to Penalty Funds**

In general, a SEP should constitute no more than 25 percent of the total settlement. For example, if a settlement is reached for a total of \$1,000,000, it should include a payment of at least \$750,000 in penalty funds and any SEP should not exceed \$250,000.

Note: This summary is only informational and does not modify the Cal/EPA “Recommended Guidance on Supplemental Environmental Projects” dated October 2003.

# Appendix A

Senate Bill 1402  
(Stats. 2010 Chap. 413)

## Senate Bill No. 1402

### CHAPTER 413

An act to amend Section 43023 of, and to add Sections 39619.7 and 43024 to, the Health and Safety Code, relating to air pollution, and declaring the urgency thereof, to take effect immediately.

[Approved by Governor September 28, 2010. Filed with  
Secretary of State September 28, 2010.]

#### LEGISLATIVE COUNSEL'S DIGEST

SB 1402, Dutton. State Air Resources Board: administrative and civil penalties.

(1) Existing law subjects violators of air pollution laws to specified civil and administrative penalties. Existing law imposes various duties on the State Air Resources Board relative to the reduction of air pollution.

This bill would require a written communication from the state board alleging that an administrative or civil penalty will be, or could be, imposed either by the state board or another party, including the Attorney General, for a violation of air pollution law, to contain specified information. The bill would require this information and final mutual settlement agreements reached between the state board and a person alleged to have violated air pollution laws to be made available to the public.

The bill would require the state board to prepare and submit to the Legislature and the Governor a report summarizing the motor vehicle pollution administrative penalties imposed by the state board for calendar year 2011, and annually thereafter, and would require the state board to publish a penalty policy for motor vehicle pollution laws that is based on specified criteria.

(2) This bill would declare that it is to take effect immediately as an urgency statute.

*The people of the State of California do enact as follows:*

SECTION 1. Section 39619.7 is added to the Health and Safety Code, to read:

39619.7. (a) A written communication from the state board alleging that an administrative or civil penalty will be, or could be, imposed either by the state board or another party, including the Attorney General, for a violation of air pollution law, shall contain a clear explanation of all of the following:

(1) The manner in which the administrative or civil penalty amount was determined, including the aggravating and mitigating factors the state board

considered in arriving at the amount, and, where applicable, the per unit or per vehicle basis for the penalty.

(2) The provision of law or regulations under which the alleged violator is being assessed the administrative or civil penalty, including the reason that provision is most appropriate for that violation.

(3) Whether the administrative or civil penalty is being assessed under a provision of law that prohibits the emission of pollution at a specified level, and if so, a quantification of the specific amount of pollution emitted in excess of that level, where practicable. This quantification may be based on estimates or emission factors.

(b) The information described in subdivision (a) and all final mutual settlement agreements reached between the state board and a person alleged to have violated air pollution laws shall be made available to the public.

SEC. 2. Section 43023 of the Health and Safety Code is amended to read:

43023. (a) As an alternative to seeking civil penalties under Chapter 1 (commencing with Section 43000) to Chapter 4 (commencing with Section 43800), inclusive, and Chapter 6 (commencing with Section 44200), for violation of state board regulations, the state board may impose an administrative penalty, as specified in this section, for a violation of this part, or any rule, regulation, permit, variance, or order of the state board pertaining to vehicular air pollution control except as otherwise provided in this division. An administrative penalty imposed pursuant to this section shall not exceed the amount that the state board is authorized to seek as a civil penalty for the applicable violation, and an administrative penalty imposed pursuant to this section shall not exceed ten thousand dollars (\$10,000) for each day in which there is a violation up to a maximum of one-hundred-thousand-dollars (\$100,000) per penalty assessment proceeding for any violation arising from the same conduct. This one hundred thousand dollar (\$100,000) maximum penalty limitation does not apply in any judicial proceeding involving violations committed under this part.

(b) Nothing in this section restricts the authority of the state board to negotiate mutual settlements under any other penalty provision of law that exceeds ten thousand dollars (\$10,000) for each day in which there is a violation up to a maximum of one hundred thousand dollars (\$100,000) per penalty assessment proceeding.

(c) The administrative penalties authorized by this section shall be imposed and recovered by the state board in administrative hearings established pursuant to Article 3 (commencing with Section 60065.1) and Article 4 (commencing with Section 60075.1) of Subchapter 1.25 of Chapter 1 of Division 3 of Title 17 of the California Code of Regulations, except that the hearings shall be conducted by an administrative law judge appointed by the Office of Administrative Hearings.

(d) Nothing in this section authorizes the state board to impose penalties for categories of violations for which the state board may not seek penalties in a civil action.

(e) If the state board imposes any administrative penalties pursuant to this section, the state board shall not bring any action pursuant to, or rely upon, Chapter 4 (commencing with Section 17000) of Part 2 of Division 7 of the Business and Professions Code.

(f) In determining the amount of any administrative penalty imposed pursuant to this section, the state board shall take into consideration all relevant circumstances, including, but not limited to, those factors specified in subdivision (b) of Section 43031.

(g) After an order imposing an administrative penalty becomes final pursuant to the hearing procedures identified in subdivision (c), and no petition for a writ of mandate has been filed within the time allotted for seeking judicial review of the order, the state board may apply to the Superior Court for the County of Sacramento for a judgment in the amount of the administrative penalty. The application, which shall include a certified copy of the final order of the administrative hearing officer, shall constitute a sufficient showing to warrant the issuance of the judgment.

(h) This section does not apply to any violation for which a penalty may be assessed pursuant to Chapter 1.5 (commencing with Section 43025).

(i) This section is not intended, and shall not be construed, to grant the state board authority to assess an administrative penalty for any category of violation that was not subject to enforcement by the state board as of January 1, 2002.

(j) Any administrative penalty assessed pursuant to this section shall be paid to the Treasurer for deposit in the General Fund.

(k) A party adversely affected by the final decision in the administrative hearing may seek independent judicial review by filing a petition for a writ of mandate in accordance with Section 1094.5 of the Code of Civil Procedure.

(l) This section applies only to violations that occur on or after January 1, 2002.

(m) The state board shall prepare and submit to the Legislature and the Governor a report summarizing the administrative penalties imposed by the state board pursuant to this section for calendar year 2011, and annually thereafter.

SEC. 3. Section 43024 is added to the Health and Safety Code, to read:

43024. (a) No later than March 1, 2011, the state board shall publish a penalty policy for civil or administrative penalties prescribed under Chapter 1 (commencing with Section 43000) to Chapter 4 (commencing with Section 43800), inclusive, and Chapter 6 (commencing with Section 44200).

(b) The policy shall take into consideration all relevant circumstances, including, but not limited to, all of the following:

(1) The extent of harm to public health, safety, and welfare caused by the violation.

(2) The nature and persistence of the violation, including the magnitude of the excess emissions.

(3) The compliance history of the defendant, including the frequency of past violations.

(4) The preventive efforts taken by the defendant, including the record of maintenance and any program to ensure compliance.

(5) The innovative nature and the magnitude of the effort required to comply, and the accuracy, reproducibility, and repeatability of the available test methods.

(6) The efforts of the defendant to attain, or provide for, compliance.

(7) The cooperation of the defendant during the course of the investigation and any action taken by the defendant, including the nature, extent, and time of response of any action taken to mitigate the violation.

(8) The financial burden to the defendant.

SEC. 4. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are:

In order that air pollution penalties are imposed in furtherance of state goals as quickly as possible, it is necessary that this act take effect immediately.

# Appendix B

## Matrix of ARB Regulations and Corresponding Penalties



Item #	Regulation or Program CA Regulatory or Statutory Code Program Internet Site	Enforceable Requirements	Enforcement Processes	Criteria	Applicable Penalties
1	Aerosol Coating Products Title 17, CCR, Sections 94700-94701 <a href="http://www.arb.ca.gov/consprod/regs/2008/aptmirtab.pdf">http://www.arb.ca.gov/consprod/regs/2008/aptmirtab.pdf</a>	Administrative Requirements (Labeling, Dating, Reporting), Maximum Incremental Reactivity (MIR) Limits	Field Inspections, Laboratory Confirmatory Testing	<a href="#">Health and Safety Code §42403</a>	Health and Safety Code §42400, et seq., up to \$10,000 per violation per day
2	Aftermarket Parts Title 13 CCR 1900+, 2030-31, 2047-48, 220-2207, 2220-2225 California Vehicle Code (CVC), Section 27156 <a href="http://www.arb.ca.gov/msprog/aftermkt/aftermkt.htm">http://www.arb.ca.gov/msprog/aftermkt/aftermkt.htm</a>	Valid CA Executive Order Advertising E.O. Number Label Requirements Legal Application Warranty New Engine Compliance	Field Inspections Emission Testing Audit Testing Self Disclosure Certification/Exemptions, Field Inspections, Manufacturer and Dealer Audits, Informants		Health and Safety Code §43154 maximum \$5000 if the vehicle is eligible for CA DMV registration Health and Safety Code §43016 \$500 if not eligible for CA DMV registration 43212 \$50 label violation
3	Agricultural Equipment, In-Use <a href="http://www.arb.ca.gov/ag/agtractor/agtractor.htm">http://www.arb.ca.gov/ag/agtractor/agtractor.htm</a>	Regulation under development	PROPOSED REGULATION	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674(a) up to \$1,000 per violation per day and §39674(b) up to \$10,000
4	Antiperspirants and Deodorants Title 17, CCR, Sections 94500-94506.5 <a href="http://www.arb.ca.gov/consprod/regs/2008/apdo.pdf">http://www.arb.ca.gov/consprod/regs/2008/apdo.pdf</a>	Administrative Requirements (Labeling, Dating, Reporting), Medium and High Volatility Organic Compound Limits	Field Inspections, Laboratory Confirmatory Testing	<a href="#">Health and Safety Code §42403</a>	Health and Safety Code §42400, et seq., up to \$10,000 per violation per day
5	Asbestos NESHAP 40 CFR, Part 61, Subpart M <a href="http://www.arb.ca.gov/enf/asbestos/asbestos.htm">http://www.arb.ca.gov/enf/asbestos/asbestos.htm</a>	Notification Requirements Sampling/Analysis Requirements Certification/Training Requirements	Field Inspections Record and Certification Verification		Clear Air Act Stationary Source Civil Penalty Policy Section 113(b) of the Clean Air Act , 42 US Code §7413(b) Up to \$25,000 per day per violation
6	Automotive Refrigerant, Small Containers Title 17, CCR, 95362-95368 <a href="http://www.arb.ca.gov/regact/2009/hfc09/resubfro.pdf">http://www.arb.ca.gov/regact/2009/hfc09/resubfro.pdf</a>	Regulation adopted. Awaiting OAL approval.	PROPOSED REGULATION	<a href="#">Health and Safety Code §42403</a>	Health and Safety Code §38580 \$1,000 per Global Warming Potential Limit violation per day. Health and Safety Code §42400, et seq., up to \$10,000 per violation per day
7	Cargo Tank Vapor Recovery Title 17, CCR, Section 94014 <a href="http://www.arb.ca.gov/enf/cargotanks/cargotanks.htm">http://www.arb.ca.gov/enf/cargotanks/cargotanks.htm</a>	Annual Leak Decay Testing Recordkeeping Test Company Audits	Field Testing Inspections and Audits Complaints	<a href="#">Health and Safety Code §42403</a>	HSC §42400 Criminal Penalty for Violations HSC §42402 Violation of emission limitations; Civil Penalty
8	Composite Wood ATCM Title 17, CCR, Section 93120-93120.12 <a href="http://www.arb.ca.gov/toxics/compwood/compwood.htm">http://www.arb.ca.gov/toxics/compwood/compwood.htm</a>	Third Party Certification Requirements Recordkeeping Requirements Labeling Requirements	Field Inspections Record Audits Label Verification Emissions Testing	<a href="#">Health and Safety Code §42400.8</a>	Health and Safety Code Sections §39674, §39675, §42400, and §42402 Penalty determined by sections above, per violation per day
9	Construction Equipment, In-Use Title 13, CCR, Section 2449 <a href="http://www.arb.ca.gov/msprog/ordiesel/ordiesel.htm">http://www.arb.ca.gov/msprog/ordiesel/ordiesel.htm</a>	Reporting Requirements Identification Number Engine Retrofit/Repower/Replacement	Field Inspections, Reporting and Fleets/Facility Audits, Informants	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674(a) up to \$1,000 per violation per day and §39674(b) up to \$10,000 per violation per day
10	Consumer Products Title 17, CCR, Sections 94507-94517 <a href="http://www.arb.ca.gov/consprod/regs/gencregs.htm">http://www.arb.ca.gov/consprod/regs/gencregs.htm</a>	Administrative Requirements (Labeling, Dating, Reporting), Volatile Organic Compound (VOC) Limits, Toxic Prohibitions, Global Warming Potential Limits	Field Inspections, Laboratory Confirmatory Testing	<a href="#">Health and Safety Code §42403</a>	Health and Safety Code §38580 \$1,000 per Global Warming Potential Limit violation per day Health and Safety Code §39674 \$1,000 per Toxic Prohibition violation per day Health and Safety Code §42400, et seq., up to \$10,000 per violation per day
11	Consumer Products, Alternative Control Plan <a href="http://www.arb.ca.gov/consprod/regs/2008/acp.pdf">http://www.arb.ca.gov/consprod/regs/2008/acp.pdf</a>	Enforceable Sales Records, Recordkeeping	Recordkeeping audits	<a href="#">Health and Safety Code §42403</a>	Health and Safety Code §42400, et seq., up to \$10,000 per violation per day

Item #	Regulation or Program CA Regulatory or Statutory Code Program Internet Site	Enforceable Requirements	Enforcement Processes	Criteria	Applicable Penalties
12	Diesel Emission Control System, Verified Title 13, CCR, Sections 2706(g), 2707(c), and 2709 <a href="http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm">http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm</a>	Vehicle and Engine Label Requirements Certification/Verification Standards	Field Inspections, Facility and Manufacturer Audits Self Reporting	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674(a) up to \$1,000 per violation per day and §39674(b) up to \$10,000
13	Dry Cleaner Verification <a href="http://www.arb.ca.gov/toxics/dryclean/dryclean.htm">http://www.arb.ca.gov/toxics/dryclean/dryclean.htm</a>	Notification, Recordkeeping and Reporting Requirements Equipment Replacement Operator Certification	Field Inspections Equipment Verification Record Audits	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code Sections §39674, §39675, §42400, and §42402 Penalty determined by above sections, per violation per day
14	Fuel Containers and Spouts, Portable Title 13, CCR, Sections 2467-2467.9 <a href="http://www.arb.ca.gov/consprod/fuel-containers/pfc/pfcreg2005.pdf">http://www.arb.ca.gov/consprod/fuel-containers/pfc/pfcreg2005.pdf</a>	Administrative Requirements (Labeling, Dating, Reporting), Certification Requirements, Performance Standards	Field Inspections, Laboratory Confirmatory Testing		Health and Safety Code §43016 \$500 per portable fuel container or spout
15	Fuel Distributor (Motor Vehicle Fuel) Health and Safety Code, Section 43026 <a href="http://www.arb.ca.gov/enf/fuels/distcert.htm">http://www.arb.ca.gov/enf/fuels/distcert.htm</a>	Registration Recordkeeping	Review Registration Review Documents	<a href="#">Health and Safety Code §43026</a>	Health and Safety Code, Section §43026
16	Fuel, Low Carbon Standard Title 17, CCR, Sections 95480 thru 95490 <a href="http://www.arb.ca.gov/regact/2009/lcs09/lcs09.htm">http://www.arb.ca.gov/regact/2009/lcs09/lcs09.htm</a>	Quarterly Reporting by Producers & Importers of Motor Fuel. Annual decrease in carbon intensity	Records Review, Audits, Field Inspections	<a href="#">Health and Safety Code §42400.8</a>	H&SC §42400
17	Fuels Title 13, CCR, Sections 2250 to 2259; 2260 to 2276; 2280 to 2285; 2290 to 2293.5; and 2299 to 2299.5 <a href="http://www.arb.ca.gov/fuels/fuels.htm">http://www.arb.ca.gov/fuels/fuels.htm</a>	Fuel Standards Reporting Requirements Recordkeeping Fuel Testing	Field Inspections Record Audits Review Submitted Reports	<a href="#">Health and Safety Code §43031</a>	Health and Safety Code, Sections §43027 to §43031
18	Heavy-Duty Vehicle Inspection Program Title 13, CCR, Sections 2180-2189 <a href="http://www.arb.ca.gov/enf/hdvp/hdvp.htm">http://www.arb.ca.gov/enf/hdvp/hdvp.htm</a>	Smoke Opacity Standards Tampering	Field Inspections, Informants	<a href="#">13 CCR 2180 et seq.</a> <a href="#">Harris et. al case law</a>	Health and Safety Code §44011.6; \$300 First Citation; \$800 After 45 Days; \$1800 2nd Citation in 12 Months
19	Idling, Commercial Vehicle/Sleeper Berth Title 13, CCR, Section 1956.8 and 2485 <a href="http://www.arb.ca.gov/msprog/truck-idling/truck-idling.htm">http://www.arb.ca.gov/msprog/truck-idling/truck-idling.htm</a>	Idling Time Restriction	Field Inspections, Public Complaints	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §43704; \$300 Minimum
20	Indoor Air Cleaning Devices Title 17, CCR, 94800-94810 <a href="http://www.arb.ca.gov/regact/2007/iacd07/finalreg07.pdf">http://www.arb.ca.gov/regact/2007/iacd07/finalreg07.pdf</a>	Administrative Requirements (Labeling, Dating, Reporting), Certification Requirements, Ozone Emission Limits	Field Inspections, Laboratory Confirmatory Testing	<a href="#">Health and Safety Code §42403</a>	Health and Safety Code §42400, et seq. \$1,000 per violation per day
21	Mandatory Reporting Title 17, CCR, Sections 95100 thru 95133 <a href="http://www.arb.ca.gov/cc/ccei.htm">http://www.arb.ca.gov/cc/ccei.htm</a>	Emissions Reporting and Recordkeeping	Audit of 3 <sup>rd</sup> Party Verifiers & Facility Reports, Facility Inspections	<a href="#">Health and Safety Code §42400.8</a>	H&SC §42400
22	Marine/Watercraft Title 13 CCR 2440-2448 <a href="http://www.arb.ca.gov/msprog/offroad/recmarine/recmarine.htm">http://www.arb.ca.gov/msprog/offroad/recmarine/recmarine.htm</a>	Valid CA Executive Order Test Procedures/Emissions Labels Warranty	Field Inspections Emission Testing Audit Testing	<a href="#">Health and Safety Code § 43016</a>	HSC §43016 Max. \$500/eng. \$50 for test procedure violations under HSC §43212
23	Motor Vehicles/Engines, New HSC 43150-154 <a href="http://www.arb.ca.gov/msprog/onroad/onroad.htm">http://www.arb.ca.gov/msprog/onroad/onroad.htm</a>	Valid CA Executive Order Test Procedures/Emissions Labels Warranty	Field Inspections Emission Testing Audit Testing Self Disclosure	<a href="#">Health and Safety Code §43016</a> <a href="#">Wilmshurst Case law</a>	Health and Safety Code §43154 maximum \$5000 if the vehicle is eligible for CA DMV registration Health and Safety Code §43016 \$500 if not eligible for CA DMV registration §43212 \$50 label violation
24	Off-Highway Recreational Vehicles Title 13 CCR 2410-2415 <a href="http://www.arb.ca.gov/msprog/offroad/orrec/orrec.htm">http://www.arb.ca.gov/msprog/offroad/orrec/orrec.htm</a>	Valid CA Executive Order Test Procedures/Emissions Labels Warranty	Field Inspections Emission Testing Audit Testing Self Disclosure	<a href="#">Health and Safety Code §43150</a>  <a href="#">Health and Safety Code §43016</a>	Health and Safety Code 43154 maximum \$5000 if the vehicle is eligible for CA DMV registration Health and Safety Code §43016 \$500 if not eligible for CA DMV registration §43212 \$50 label violation

Item #	Regulation or Program CA Regulatory or Statutory Code Program Internet Site	Enforceable Requirements	Enforcement Processes	Criteria	Applicable Penalties
25	Off-Road Engine Certification, Compression Ignition Title 13 CCR 2420-2427 <a href="http://www.arb.ca.gov/msprog/offroad/orcomp/orcomp.htm">http://www.arb.ca.gov/msprog/offroad/orcomp/orcomp.htm</a>	Valid CA Executive Order Test Procedures/Emissions Labels Warranty	Field Inspections Emission Testing Audit Testing Self Disclosure		Health and Safety Code §43154 maximum \$5000 if the vehicle is eligible for CA DMV registration Health and Safety Code §43016 \$500 if not eligible for CA DMV registration §43212 \$50 label violation
26	Off Road Engine Certification, Small Title 13 CCR 2400-2409 <a href="http://www.arb.ca.gov/msprog/oofroad/sore/sore.htm">http://www.arb.ca.gov/msprog/oofroad/sore/sore.htm</a>	Valid CA Executive Order Test Procedures/Emissions Labels Warranty	Field Inspections Emission Testing Audit Testing Self Disclosure	<a href="#">Health and Safety Code §43016</a>	HSC 43016 Max. \$500/eng. \$50 for test procedure violations under HSC 43212
27	Off-Road New Diesel Engine Standards Certification Title 13, CCR, Sections 2420-2427 <a href="http://www.arb.ca.gov/msprog/offroad/ofcie/ofciecpt/ofciecpt.htm">www.arb.ca.gov/msprog/offroad/ofcie/ofciecpt/ofciecpt.htm</a>	New Engine Compliance	Certification, In-Use Compliance Testing, Selective Enforcement Audits, Field Inspections,	<a href="#">Health and Safety Code 43150 et seq.</a>	Health and Safety Code §43154 maximum \$5000 if the vehicle is eligible for CA DMV registration Health and Safety Code §43016 \$500 if not eligible for
28	On-Road Heavy-Duty Vehicle Engine Certification Label Program Title 13, CCR, Sections 2180-2189 <a href="http://www.arb.ca.gov/enf/hdvp/bip/bip.htm">http://www.arb.ca.gov/enf/hdvp/bip/bip.htm</a>	Manufacturer-installed emissions label must be in place to show that engine met U.S. EPA standards at time of manufacture.	Field Inspections, Informants	13 CCR 2180 et seq.	Health and Safety Code §44011.6; \$300 First Citation; \$800 After 45 Days; \$1800 2nd Citation in 12 Months
29	On-Road Heavy-Duty Vehicle On-Board Diagnostics Title 13, CCR, Sections 1968.2, 1968.5, 2035, 2037, and 2038 <a href="http://www.arb.ca.gov/msprog/obdprog/obdprog.htm">www.arb.ca.gov/msprog/obdprog/obdprog.htm</a>	New Engine Compliance	Certification, Field Inspections, Laboratory Confirmatory Testing	<a href="#">Health and Safety Code 43150 et seq.</a> <a href="#">Wilmshurst Case law</a>	Health and Safety Code §43154 maximum \$5000 per vehicle
30	On-Road New Diesel Engine Emission Standards Certification Title 13, California Code of Regulations (CCR), Sections 1956.8, 1971, and 1971.1 <a href="http://www.arb.ca.gov/msprog/onroad/cert/cert.php">http://www.arb.ca.gov/msprog/onroad/cert/cert.php</a>	New Engine Compliance	Certification, In-Use Compliance Testing/Selective Enforcement Audits, Field Inspections, Manufacturer and Dealer Audits	<a href="#">Health and Safety Code 43150 et seq.</a>	Health and Safety Code §43154 maximum \$5000 per vehicle
31	Outboard Marine Tanks and Components, Portable Title 13, CCR, 2468-2468.10 <a href="http://www.arb.ca.gov/regact/2008/om2008/oalfro.pdf">http://www.arb.ca.gov/regact/2008/om2008/oalfro.pdf</a>	Administrative Requirements (Labeling, Dating, Reporting), Certification Requirements, Performance Standards	Field Inspections, Laboratory Confirmatory Testing		Health and Safety Code §43016 \$500 per Marine Tank or Component
32	Periodic Smoke Inspection Program Title 13, CCR, Sections 2190-2194 <a href="http://www.arb.ca.gov/enf/hdvp/hdvp.htm">http://www.arb.ca.gov/enf/hdvp/hdvp.htm</a>	Smoke Opacity Standards Recordkeeping Requirements	Reporting and Audits, Fleets/Facility Audits, Informants	13 CCR 2190 et seq.	Health and Safety Code §43016
33	Portable Equipment Title 13, CCR, Section 2450 and Title 17, CCR, Section 93116 <a href="http://www.arb.ca.gov/portable/portable.htm">http://www.arb.ca.gov/portable/portable.htm</a>	Engine Certification Standards Registration and Labeling Requirements	Field Inspections by Air Districts, Program Oversight by ARB, Informants	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674, §39675, §42400, and §42402 Penalty determined by above sections, per violation per day
34	Public Agencies and Utilities Fleets Title 13, CCR, Sections 2022 and 2022.1 <a href="http://www.arb.ca.gov/msprog/publicfleets/publicfleets.htm">http://www.arb.ca.gov/msprog/publicfleets/publicfleets.htm</a>	Fleet Recordkeeping Requirements Vehicle Labeling Requirements	Field Inspections, Reporting and Fleets/Facility Audits	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code Section 44381. Min = \$500 per day Max = \$10,000 per day
35	Public Transit Bus Fleets Title 13, CCR, Sections 1956.1 and 1956.4 <a href="http://www.arb.ca.gov/regact/bus02/bus02.htm">www.arb.ca.gov/regact/bus02/bus02.htm</a>	Fleet Recordkeeping Reporting Requirements	Reporting, Fleets/Facility Audits	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674 \$10,000 per violation per day
36	Railroad Strategies (N/A) <a href="http://www.arb.ca.gov/msprog/offroad/loco/loco.htm">http://www.arb.ca.gov/msprog/offroad/loco/loco.htm</a>	Idling Time Restrictions Fuel Specifications	Reporting and Audits, Fleets/Facility Inspections, Field Inspections, Public Tips, Informants	<a href="#">Railroad MOU</a>	ARB/Railroad Statewide Agreement \$400 first violation \$800 second violation - same year \$1200 third violation - same year
37	School Bus Idling and Idling at Schools Title 13, CCR, Section 2480 <a href="http://www.arb.ca.gov/msprog/schoolbus/schoolbus.htm">http://www.arb.ca.gov/msprog/schoolbus/schoolbus.htm</a>	Idling Standards Fleet Recordkeeping Requirements	Field Inspections, Public Complaints	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code 39674; \$300 Minimum

Item #	Regulation or Program CA Regulatory or Statutory Code Program Internet Site	Enforceable Requirements	Enforcement Processes	Criteria	Applicable Penalties
38	SF6 in Non-Utility; Non-semiconductor Title 17, CCR, Sections 95340 to 95346 <a href="http://www.arb.ca.gov/regact/2009/nonsemi09/nonsemi09.htm">http://www.arb.ca.gov/regact/2009/nonsemi09/nonsemi09.htm</a>	Distributors to Register & Keep Records. Phase-out to begin in 2011.	Reporting and Audits, Field Inspections	<a href="#">Health and Safety Code §42400.8</a>	H&SC §42400
39	Solid Waste Collection Vehicles Title 13, CCR, Sections 2020, 2021, 2021.1, and 2021.2 <a href="http://www.arb.ca.gov/regact/scswcv05/scswcv05.htm">www.arb.ca.gov/regact/scswcv05/scswcv05.htm</a>	Fleet Recordkeeping Requirements Vehicle Labeling Requirements	Field Inspections, Reporting and Fleets/Facility Audits	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code Section §39674(a) \$1,000 per violation per day
40	Spark Ignited Engine Title 13 CCR 2430-2439 <a href="http://www.arb.ca.gov/msprog/offroad/orspark/orspark.htm">http://www.arb.ca.gov/msprog/offroad/orspark/orspark.htm</a>	Valid CA Executive Order Test Procedures/Emissions Labels Warranty	Field Inspections Emission Testing Audit Testing Self Disclosure	<a href="#">Health and Safety Code §43154</a> <a href="#">Health and Safety Code §43016</a>	HSC §43016 Max. \$500/eng. \$50 for test procedure violations under HSC 43212
41	Stationary Diesel Engines Title 17, CCR, Section 93115 <a href="http://www.arb.ca.gov/diesel/statport.htm">http://www.arb.ca.gov/diesel/statport.htm</a>	Engine Certification Standards Registration and Labeling Requirements	Field Inspections by Air Districts, Program Oversight by ARB	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code Sections §39674, §39675, §42400, and §42402 Penalty determined by above sections, per violation per day
42	Tire Pressure Title 17, CCR, Section 95550 <a href="http://www.arb.ca.gov/regact/2009/tirepres09/tirepres09.htm">http://www.arb.ca.gov/regact/2009/tirepres09/tirepres09.htm</a>	Auto Service Must Offer to Check and Top-off Tire Pressure. Customer may Decline this Service. Documentation Required.	Bureau of Automotive Repair will Assist in Inspection & Records Review	<a href="#">Health and Safety Code §42400.8</a>	H&SC §42400
43	Transport Refrigeration Units Title 13, CCR, Section 2477, Article 8 <a href="http://www.arb.ca.gov/diesel/tru.htm">http://www.arb.ca.gov/diesel/tru.htm</a>	Facility Reporting Equipment Registration and Labeling Engine Retrofit/Repower/Replacement	Field Inspections Reporting and Audits, Informants	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674(a) up to \$1,000 per violation per day and §39674(b) up to \$10,000
44	Trucks and Buses, In-Use Diesel Title 13, CCR, Section 2025 (PROPOSED) <a href="http://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm">http://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm</a>	Reporting Requirements Identification Number Engine Retrofit/Repower/Replacement	Field Inspections, Reporting and Fleets/Facility Audits, Informants	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674(a) up to \$1,000 per violation per day and §39674(b) up to \$10,000
45	Truck and Trailer Efficiency (Greenhouse Gas Meas.) Title 17, CCR, Section 95300 (PROPOSED) <a href="http://www.arb.ca.gov/cc/hdghg/hdghg.htm">http://www.arb.ca.gov/cc/hdghg/hdghg.htm</a>	Fleet Recordkeeping Requirements Reporting Requirements	Field Inspections, Fleets/Facility Audits	<a href="#">Health and Safety Code §42400.8</a>	HSC §42400 et seq.
46	Trucks, Heavy-Duty Drayage Title 13, CCR, Section 2027 <a href="http://www.arb.ca.gov/msprog/onroad/porttruck/porttruck.htm">http://www.arb.ca.gov/msprog/onroad/porttruck/porttruck.htm</a>	Recordkeeping and Reporting Requirements Engine Retrofit/Repower/Replacement	Reporting and Audits, Field Inspections, Public Tips	<a href="#">Health and Safety Code §39674</a>	Health and Safety Code §39674(a) up to \$1,000 per violation per day and §39674(b) up to \$10,000
47	Vapor Recovery Title 17, CCR, Sections 94000 to 94015 <a href="http://www.arb.ca.gov/vapor/vapor.htm">http://www.arb.ca.gov/vapor/vapor.htm</a>	Certified Vapor Recovery Systems	Field Inspections, Complaints, District Referrals	<a href="#">Health and Safety Code §42403</a>	HSC §42400 Criminal Penalty for Violations HSC §42402 Violation of emission limitations; Civil Penalty
48	Vessel (Ocean-Going) Incineration ATCM Title 17, CCR, Section 93119 <a href="http://www.arb.ca.gov/regact/csoi06/csoi06.htm">http://www.arb.ca.gov/regact/csoi06/csoi06.htm</a>	Recordkeeping Requirements	Field Inspections, Record Audits	<a href="#">Health and Safety Code §43154</a> <a href="#">Health and Safety Code §43016</a>	Health and Safety Codes §39674, §39675, §42400, and §42402 Penalty determined by above sections, per violation per hour
49	Vessels, Fuel Sulfur and Other Operational Requirements for Ocean-Going Title 13, CCR, Sections 2299.2 and Title 17, CCR, Section 93118.2 <a href="http://www.arb.ca.gov/ports/marinevess/marinevess.htm">http://www.arb.ca.gov/ports/marinevess/marinevess.htm</a>	Recordkeeping Requirements Fuel Specifications	Field Inspections, Informants	<a href="#">Health and Safety Code §39674</a>	Health and Safety Codes §39674, §39675, and §42400 sections Penalty determined by above sections, per violation per hour

# Appendix C

Cal/EPA's October 2003  
“Recommended Guidance  
on Incentives for  
Voluntary Disclosure”

# **CAL/EPA RECOMMENDED GUIDANCE ON INCENTIVES FOR VOLUNTARY DISCLOSURE**

**October 2003**

## **Purpose**

This Guidance is designed to enhance the protection of human health and the environment by encouraging regulated entities to prevent or to discover voluntarily, disclose, and correct violations of federal, state and local environmental requirements through the use of routine, systematic application of an environmental compliance auditing program.

## **Definitions**

For purposes of this Guidance, the following definitions apply:

"Environmental Audit" is a systematic, documented, periodic, and objective review by regulated entities of facility operations and practices related to meeting environmental requirements.

"Due Diligence" encompasses the regulated entity's systematic efforts, appropriate to the size and nature of its business, to prevent, detect, disclose, and correct violations through all of the following:

1. Compliance policies, standards, and procedures that identify how employees and agents are to meet the requirements of laws, regulations, permits, and other sources of authority for environmental requirements;
2. Assignment of overall responsibility for overseeing compliance with policies, standards, and procedures, and assignment of specific responsibility for assuring compliance at each facility or operation;
3. Mechanisms for systematically assuring that compliance policies, standards, and procedures are being carried out. These include monitoring and auditing systems reasonably designed to detect and correct violations, periodic evaluation of the overall performance of the compliance management system, and a means for employees or agents to report violations of environmental requirements without fear of retaliation;

4. Efforts to communicate effectively the regulated entity's standards and procedures to all employees and other agents whose duties involve environmental compliance;
5. Appropriate incentives to managers and employees to perform in accordance with the compliance policies, standards, and procedures, including consistent enforcement through appropriate disciplinary mechanisms; and
6. Procedures for the prompt and appropriate disclosure and correction of any violations, and for any necessary modifications to the regulated entity's program to prevent future violations.

"Environmental audit report" means the analysis, conclusions, and recommendations resulting from an environmental audit, but does not include data obtained in, or testimonial evidence concerning, the environmental audit.

"Gravity based penalties" are that portion of a penalty over and above the economic benefit of noncompliance, whether or not they are labeled as such, i.e., the punitive portion of the penalty, rather than that portion representing a defendant's economic gain from non-compliance. (For further discussion of this concept, see "A Framework for Statute-Specific Approaches to Penalty Assessments," #GM-22, 1980, U.S. EPA General Enforcement Policy Compendium. See also the particular penalty statutes and regulations for the individual enforcing agency bringing the action).

"Regulated entity," means any person, facility, or entity, including a federal, state, or municipal agency, regulated under federal, state, or local environmental laws.

### **C. Incentives**

This section identifies the major incentives provided to encourage self-audits, prompt disclosure and correction. These may include significantly reducing or not seeking gravity based civil penalties, declining to refer for criminal prosecution companies that self-report, and refraining from routine requests for audits.

#### **1. Waiving Gravity Based Penalties**

Where the regulated entity establishes that it satisfies all of the conditions of Section D, gravity based penalties for violations of environmental requirements may be waived if allowed by applicable statute. Gravity based penalties (defined in Section B) generally reflect the seriousness of the violator's behavior. It would be appropriate to waive a portion of such penalties for violations discovered through due diligence or environmental audits, recognizing that these voluntary efforts play a critical role in protecting human health and the environment by identifying, correcting, and ultimately preventing violations. The conditions set forth in Section D, which include prompt

disclosure and expeditious correction must be satisfied for any portion of gravity based penalties to be waived.

Any economic benefit obtained as a result of noncompliance should be recovered, even when all other conditions of the Guidance are met. Economic benefit could be waived, however, if the enforcing agency determines that it is insignificant. The recovery of economic benefit is important for two reasons. First, it provides an incentive to comply in a timely manner. Taxpayers expect to pay interest or a penalty fee if their payments are late; the same principle should apply to corporations that have delayed their investment in compliance. Second, it is fair because it protects responsible companies from being undercut by their noncomplying competitors, thereby preserving a level playing field.

## 2. Reduction of Gravity Based Penalties

Gravity based penalties for violations of environmental requirements can be reduced to the extent the regulated entity satisfies the conditions of Section D below. The enforcing agency, may, at its sole discretion, reduce the gravity based penalties further as a credit for investment in Supplemental Environmental Projects (See Cal/EPA guidance on Supplemental Environmental Projects.).

The complete waiver of gravity based civil penalties should be available only to companies that meet the higher standard of reporting as a result of conducting an environmental auditing or systematic compliance management. However, to provide encouragement for the kind of self-policing that benefits the public, gravity based penalties can be significantly reduced for a violation that is voluntarily discovered, promptly disclosed, and expeditiously corrected, even if it was not found through an environmental audit particularly where the company agrees to implement an environmental compliance management procedure. Cal/EPA expects that this will encourage companies to come forward and work with regulatory agencies to resolve environmental problems and begin to develop an effective compliance management program.

## 3. No Criminal Recommendations

The enforcing agency may decline to recommend to a prosecuting authority that criminal charges be brought against a regulated entity where they determine that all of the conditions in Section D are satisfied, so long as the violation does not demonstrate or involve:

- a. A management practice that concealed or condoned environmental violations; or
- b. Knowing or negligent involvement in or deliberate ignorance of the violations by corporate officials or managers.



Whether or not an enforcing agency refers the regulated entity for criminal prosecution under this section, they may reserve the right to recommend prosecution of the criminal acts of individual managers or employees.

This Guidance has important limitations. It will not apply, for example, where corporate officials are consciously and knowingly involved in, or willfully blind to, violations, or conceal or condone noncompliance. Since the regulated entity must satisfy all of the conditions of Section D, violations that caused serious harm or that may pose imminent or substantial endangerment to human health or the environment are not covered by this Guidance.

Nothing in this guidance should be construed to restrict the power of a city attorney, district attorney, county counsel, or the Attorney General to bring any criminal proceeding otherwise authorized by law or to prevent an enforcing agency from cooperating with, or participating in, such a proceeding.

#### 4. No Routine Request for Audits

It is not recommended that an enforcing agency routinely request environmental audit reports to initiate an investigation of the entity. If the enforcing agency has independent reason to believe that a violation has occurred however, it is reasonable to expect that they seek any information relevant to identifying violations or determining liability or extent of harm, including any audits that the facility may have conducted.

### **D. Conditions**

This section describes the nine conditions that a regulated entity must meet in order for an enforcing agency not to seek (or to reduce) gravity-based penalties for violations of environmental laws. As explained in the Summary above, regulated entities that meet all nine conditions may avoid gravity-based civil penalties unless otherwise mandated by statute.

#### 1. Systematic Discovery

The violation was discovered through:

- a. an environmental audit; or
- b. an objective, documented, systematic procedure or practice reflecting the regulated entity's due diligence in preventing, detecting, and correcting violations. The regulated entity must provide accurate and complete documentation to the enforcing agency as to how it exercises due diligence to prevent, detect, and correct violations according to the criteria for due diligence outlined in Section B. The enforcing agency may require as a condition of penalty mitigation that

a description of the regulated entity's due diligence efforts be made publicly available.

2. Voluntary Discovery

The violation was identified voluntarily, and not through a legally mandated auditing, monitoring, or sampling requirement prescribed by statute, regulation, permit, variance, judicial or administrative order, or consent agreement.

3. Prompt Disclosure

The regulated entity must have fully disclosed in writing to the appropriate federal, state or local agency, a specific violation promptly after the violation is discovered. Promptly is nominally defined as 21 working days or such shorter period as provided by law.

The 21 day period begins when the regulated entity discovers that a violation has, or may have, occurred. The trigger for discovery is when any officer, director, employee or agent of the facility has an objectively reasonable basis for believing that a violation has, or may have, occurred. Where an entity has some doubt about the existence of a violation, the recommended course is for it to disclose and allow the regulatory authorities to make a definitive determination.

The 21 working day period may not always be appropriate. Many laws and permits require immediate notification. In other instances where circumstances are complex, do not present a serious threat, and take longer to evaluate, disclosures within 21 days may not be practical. The enforcing agency may accept later disclosures as "prompt" where the regulated entity meets its burden of showing that the additional time was needed to determine compliance status and did not expose the public to unreasonable risk. Conversely, if the violation objectively represented an imminent threat to human health or the environment, reporting within 21 working days will not be deemed reasonable. Satisfaction of the prompt disclosure condition is solely within the discretion of the enforcing agency.

This condition recognizes that it is critical for enforcing agencies to receive timely and accurate reports of violations, in order to have clear notice of the violations and the opportunity to respond if necessary. Prompt disclosure is also evidence of a facility's good faith attempt to achieve or return to compliance as soon as possible.

4. Discovery and Disclosure Independent of Government or Third Party Plaintiff

Regulated entities must have taken the initiative to find violations and promptly report them, rather than reacting to knowledge of a pending enforcement action or third party complaint. Thus this condition specifies that the violation has to have been identified and disclosed by the regulated entity prior to:

- a. The commencement of a federal, state, or local agency inspection or investigation, or the issuance by such agency of an information request to the regulated entity or related industries;
- b. Notice or commencement of a citizen suit;
- c. The filing of a complaint by a third party;
- d. The reporting of the violation to a government agency by a "whistle blower" employee, rather than by one authorized to speak on behalf of the regulated entity; or
- e. The imminent discovery of the violation by a regulatory agency.

#### 5. Correction and Remediation

The regulated entity corrected the violations immediately, certified in writing that the violations have been corrected, and took appropriate measures as determined by the appropriate agency to remedy any environmental or human harm resulting from the violation. Where appropriate, the enforcing agency will require that to satisfy conditions 5, 6, and 8, a regulated entity enter into a publicly available written agreement, administrative consent order, variance, or judicial consent decree, particularly where compliance or remedial measures are complex or a lengthy schedule for attaining and maintaining compliance or remediating harm is required.

This Guidance requires the violation to be corrected immediately reflecting the expectation that regulated entities will move quickly to meet their obligations under the law. While it is expected that violations must be corrected immediately, there will be those violations that require longer-term remedies, such as where significant capital expenditures are involved, or where regulatory oversight is required. The regulated entity will be expected to do its utmost to achieve compliance under the law, and the appropriate enforcing agency will retain sole discretion to determine whether the regulated entity timely corrected and remediated the violations.

#### 6. Prevent Recurrences

The regulated entity agrees in writing to take steps to prevent a recurrence of the violation, which may include improvements to its environmental auditing or due diligence efforts.

#### 7. No Repeat Violations

The violation (or similar violation) shall not have occurred at the same facility within the past three years. This three year time period begins to run when the government has given the violator notice of the violation, without regard to when the violation cited in the notice actually occurred. For purposes of this determination, a violation includes:

- a. Any noncompliance with a federal, state, or local environmental law or regulation identified in a conviction, plea agreement, judicial order, final administrative order, consent agreement, variance, or in a notice of violation or inspection report.
- b. Any act or omission for which the regulated entity has previously received penalty mitigation from a federal, state or local agency.

This condition bars repeat or chronic offenders from receiving penalty reduction and benefits both the public and law-abiding entities by ensuring that penalties are not waived for those entities that have previously been notified of violations and have failed to prevent repeat violations. The enforcing agency should consider all the facts and circumstances relating to any prior violation in determining whether it is a repeat violation.

This condition applies if the entity was operating under the same ownership and/or management when both violations occurred. When the facility is part of a multi-facility organization, relief under this guidance is unavailable if the same or a closely related violation occurred as part of a pattern of similar violations at one or more of these facilities within the past five years.

#### 8. Serious Violations Excluded

The violation is not one which (1) resulted in actual harm, or which may present an imminent or substantial endangerment to, human health or the environment, or (2) violates the specific terms of any judicial or administrative order, or consent agreement.

This condition makes clear that violations that result in actual harm or which may present an imminent or substantial endangerment to public health or environment are excluded from consideration under this guidance.

The Guidance also excludes penalty reductions for violating the specific terms of any judgment, order, consent agreement, or plea agreement. Once an order or agreement is in effect, there is little incentive to comply if there are no sanctions for violating its specific requirements. The exclusion in this section also applies to any failure to implement any response, removal, or remedial action covered by a written judgment, order or agreement.

#### 9. Cooperation

The regulated entity timely and fully cooperated as requested by any regulatory agency and provided the agency with the information it needs to determine applicability of this Guidance. Cooperation includes, at a minimum; timely providing all requested documents, and access to employees and the facility; and providing assistance in

investigating the violation, other related compliance problems, and any environmental consequences related to the violations. The regulated entity must not hide, tamper with, or destroy possible evidence following discovery of potential environmental violations.

This section makes clear that recalcitrant violators are excluded from consideration under this guidance. To be considered under the guidance, all entities that have been ordered or requested to come into compliance shall have done so pursuant to any time frame described by the enforcing agency. Entities that are determined to have refused lawful orders shall not benefit from their recalcitrance.

## **E. Economic Benefit**

The enforcing agency should retain full discretion to recover any economic benefit gained as a result of noncompliance to preserve a "level playing field" in which violators do not gain a competitive advantage over regulated entities that do comply. The enforcing agency may forgive all or any portion of the penalty for violations which meet Conditions 1 through 9 in Section D, and which in its opinion do not merit the full penalty due to the insignificant amount of any economic benefit.

In determining economic benefit, the enforcing agency should also take into consideration any documented expenditures the regulated entity has made to create and implement an environmental audit or due diligence program, which can be significant. Such expenditures may counterbalance the economic benefit of the violations.

## **F. Applicability**

At the discretion of the enforcing agency, this Guidance may be applied to settlement of claims for administrative or civil penalties for violations under statutes and regulations within the jurisdiction of enforcing agencies.

It is within the discretion of the enforcing agency to determine whether it is appropriate that a regulated entity that has received penalty mitigation for satisfying specific conditions under this Guidance receive additional penalty mitigation for satisfying the same or similar conditions under other policies for the same violation(s).

This Guidance sets forth factors for consideration that will guide the enforcing agencies in the exercise of their enforcement discretion, and is intended as guidance only. It does not create any rights, duties, obligations, or defenses, implied or otherwise, in any third parties. This guidance is not promulgated in regulation or statute and as such is not binding on any Board, Department or local agency.

This Guidance can be used in settlement negotiations for both administrative and civil judicial enforcement actions. It is not intended for use in pleading, at hearing, or at trial. The Guidance may be applied at the enforcing agency's discretion to the settlement of

administrative and judicial enforcement actions instituted prior to, but not yet resolved, as of the effective date of this Guidance.

#### **G. Scope Of Guidance**

Cal/EPA has developed this document as a guide for settlement actions involving a broad range of environmental violations. All enforcing agencies are encouraged to adopt similar policies in order to assure statewide consistency in application.

#### **H. Making Disclosures**

Disclosures should be made to state and local agencies that have jurisdiction over their reported violations, i.e. to the local air district for air violations, to the local CUPA and/or the Department of Toxic Substance Control for hazardous waste violations. A copy may also be sent to Cal/EPA, attention legal unit. Reports to the US EPA should follow the guidelines set forth in their guidance.

# Appendix D

Cal/EPA's October 2003  
“Recommended Guidance  
on Supplemental  
Environmental Projects”

# **CAL/EPA RECOMMENDED GUIDANCE ON SUPPLEMENTAL ENVIRONMENTAL PROJECTS**

**October 2003**

## **A. Introduction**

In settlement of environmental enforcement cases, Cal/EPA's Boards, Departments and Offices (BDOs) and local counterparts must insist upon terms that require defendants/respondents achieve and maintain compliance with environmental laws and regulations and where appropriate, pay a penalty for violations. The recovery of economic benefit and the imposition of additional gravity based penalties should be considered in every case. Additional relief remediating the adverse public health or environmental consequences of the violations at issue should be included in the settlement to offset the effects of the particular violation. As part of the settlement, the agreement may require the defendant/respondent to undertake supplemental environmentally beneficial expenditures that exceed regulatory requirements. These additional projects are known as supplemental environmental projects, or SEPs.

Evidence of a violator's commitment and ability to perform a SEP is factor in determining whether a SEP is appropriate. Although SEPs may not be appropriate in all instances, they can play an important part of an effective enforcement program. SEPs can play a role in securing additional significant environmental or public health protection. SEPs may be particularly appropriate to further the objectives in the statutes administered by the BDOs and local agencies, and to achieve policy goals such as pollution prevention and environmental restoration.

## **B. SEP Procedure**

In evaluating a proposed project to determine if it qualifies as a SEP, the following five-step procedure may be used:

1. Ensure that the project meets the basic definition of SEP (See Section B).
2. Ensure that all legal guidelines, including nexus, are satisfied (See Section C).
3. Ensure that the project fits within one (or more) categories of SEPs (See Section D).
4. Ensure that the cost of the project is appropriate in relationship to the fines paid (See Section E).
5. Ensure that the project satisfies all of the implementation and other criteria. (See Section F, G, and H).



This guidance is intended to apply to all civil judicial and administrative enforcement actions taken under the authority of the environmental statutes and regulations administered by the Cal/EPA BDOs. It may also be used by local authorities enforcing related environmental ordinances and codes. Claims for stipulated penalties for violations of orders or settlement agreements should not be mitigated by the use of a SEP. This guidance is intended to assist in the settlement of an enforcement action, and thus is not intended for use by any party at a hearing or trial. In addition, the amount of any penalty mitigation that may be given for a SEP is strictly within the discretion of the administering agency, as is the determination of whether the use of a SEP is appropriate in any particular case.

### **C. Definition and Key Characteristics of a SEP**

Supplemental environmental projects are defined as environmentally beneficial projects that a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform. The three key parts of this definition are elaborated as follows:

1. "Environmentally beneficial" means a SEP must improve, protect, or reduce risks to public health or the environment at large. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.
2. "In settlement of an enforcement action" means (1) The enforcing agency has the opportunity to help shape the scope of the project before it is implemented; and (2) the project is not commenced until after the enforcing agency has identified a violation (e.g., issued a notice of violation, administrative order, or complaint).
3. "Not otherwise legally required to perform" means the SEP is not required by a federal, state, or local law or regulation. Further, SEPs cannot include actions that the defendant/respondent may be legally required to perform, such as:
  - a. Injunctive relief in the instant case, or in another legal action that an enforcement agency could bring;
  - b. part of an existing settlement or order in another legal action; or
  - c. federal, state or local requirements.

SEPs may include activities that the defendant/respondent will become legally obligated to undertake two or more years in the future. Such "accelerated compliance" projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

Performance of a SEP reduces neither the stringency nor timeliness requirements of applicable environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent's obligation to remedy a violation expeditiously and return to compliance.

For many of these projects, the defendant/respondent may lack the experience, knowledge or ability to conduct and /or implement the project. In these instances the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project

#### **D. Legal Guidelines**

Environmental regulatory agencies have broad discretion to settle cases, including the discretion to include a SEP as an appropriate part of the settlement. The legal evaluation of whether a proposed SEP is within the regulatory agencies' authority and consistent with all statutory and constitutional requirements may be a complex task and should be thoroughly evaluated by the individual agency.

As noted by the Attorney General, statutes and case law allow administrative agencies to settle cases prior to trial or hearing containing sanctions that an agency would not otherwise have the authority to impose (Attorney General Opinion No. 00-510, July 25, 2000). The Attorney General also notes the ability to enter into creative settlements is limited by the caveat that no such settlement shall violate public policy and must further the goals and purposes of the agency. The Opinion concluded that an agency may not enter into a settlement that requires payment of funds that support activities unrelated to the regulatory enforcement responsibilities of the agency.

With this in mind, the following are required when a SEP is considered:

1. A project cannot be inconsistent with any provision of the underlying statutes. In addition a project shall advance at least one of the declared objectives of the environmental statutes that are the basis of the enforcement action.
2. All projects should have adequate "nexus" to the regulatory enforcement responsibilities of the agency. Nexus is the relationship between the violation and the proposed project. This relationship exists if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future.
3. The type and scope of each SEP should be clearly defined in the signed settlement document. Thus a SEP that has terms that are intended to be defined after the settlement document is entered into should be avoided.

## **E. Categories of Supplemental Environmental Projects**

There are several types of projects that may be appropriate as SEPs:

### **1. Environmental Compliance Promotion**

An environmental compliance promotion project provides training, technical support, or publication media to other members of the regulated community to: (1) identify, achieve and maintain compliance with applicable statutory and regulatory requirements; (2) avoid committing a violation with respect to such statutory and regulatory requirements; or (3) go beyond compliance by reducing the generation, release or disposal of pollutants beyond legal requirements. Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent violations within the defendant/respondent's economic sector.

Environmental compliance promotion SEPs are acceptable where the primary impact of the project is focused on the same regulatory program requirements that were violated, and where the administering agency has reason to believe that compliance in the sector would be significantly advanced by the proposed project. The defendant/respondent should be required to note in any promotional material or credits that the production of the promotion is in response to an enforcement action against the respondent/defendant.

### **2. Enforcement Projects**

Such projects may include contributions to environmental enforcement, investigation and training programs as provided in Penal Code section 14300 and/or contributions to nonprofit organizations such as the California District Attorneys Association, the Californian Hazardous Materials Investigators Association and the Western States Project. These supplemental projects should be consistent with the settlement contribution guidelines for these respective organizations.

### **3. Emergency Planning and Preparedness**

An emergency planning and preparedness project provides assistance, such as computers and software, equipment, or training, to an emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the federal Emergency Right to Know Act and state statutes to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district affected by the violations.

#### 4. Pollution Prevention

A pollution prevention project is one which reduces the generation of pollution through "source reduction," i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant entering any waste stream or otherwise being released into the environment prior to recycling, treatment or disposal. (After the pollutant or waste stream has been generated, pollution prevention is no longer possible, and the waste must be handled by appropriate recycling, treatment, containment, or disposal methods.)

Source reduction may include equipment or technology modifications, process or procedure modification, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. Pollution prevention also includes any project that protects natural resources through conservation or increased efficiency in the use of energy, water, or other materials. "In-process recycling," wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released to the environment, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water, or other materials.

#### 5. Pollution Reduction

If the pollutant or waste stream already has been generated or released, a pollution reduction approach, which employs recycling, treatment, containment or disposal techniques, may be appropriate. A pollution reduction project is one which results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant entering any waste stream, or otherwise being released into the environment by an operating business or facility by a means which does not qualify as "pollution prevention." This may include the installation of more effective end-of-process control or treatment technology. This also includes "out-of-process recycling," wherein industrial waste collected after the manufacturing process and/or consumer waste materials are used as raw materials for production off-site, reducing the need for treatment, disposal, or consumption of energy or natural resources.

#### 6. Environmental Restoration and Protection

An environmental restoration and projection project is one that goes beyond repairing the damage caused by the violation to enhance the condition of the ecosystem or immediate geographic area adversely affected. These projects may be used to restore or protect natural environments (such as ecosystems) and man-made environments such as facilities and buildings. Also included, is any project that protects the ecosystem from actual or potential damage resulting from the violation or improves the overall condition of the ecosystem. Examples of such projects include: restoration of a wetland in the same ecosystem in which the

facility is located; projects which provide for the protection of threatened or endangered species by improving critical habitat impacted by facility operations; or purchase and management of a watershed area by the defendant/respondent to protect a drinking water supply where the violation, e.g., a reporting violation, did not directly damage the watershed, but potentially could lead to damage due to unreported discharges.

With regards to man-made environments, such projects may involve the remediation of facilities and buildings provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos and leaded paint, which are a continuing source of releases and/or threat to individuals.

#### 7. Public Health

A public health project provides diagnostic, preventative and/or remedial components of human health care that is related to the actual or potential damage to human health caused by the violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy. Public health SEPs are acceptable only where the primary benefit of the project is to the population that was harmed or put at risk by the violations.

#### 8. Other Types of Projects

Other types of projects may be determined to have environmental merit that do not fit within the above categories but are otherwise fully consistent with all other provisions of this guidance.

#### 9. Projects that are Not Acceptable as SEPs

The following are examples of the types of projects that should not be allowable as SEPs:

- a. General education or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, or promoting recycling in a community.
- b. Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to charity, or donating playground equipment.

#### **F. Penalties**

Even when conditions exist which justify the approval of a SEP, the penalty policies of the BDOs should still require that an adequate monetary penalty be assessed. This penalty should be sufficient to provide a deterrent effect as well as to remove any unfair competitive advantage or economic benefit gained by the facility defendant/respondent's prior noncompliance. Penalties help create the level playing field that businesses require to adequately address their environmental compliance needs, by ensuring that violators do not obtain an unfair economic

advantage over their competitors. Allowing "one free bite of the apple" is a disincentive for voluntary compliance, hurts law abiding businesses and requires the regulator to become the compliance manager for business, a function that is neither appropriate or within our limited resources. Penalties also encourage regulated entities to adopt pollution prevention and recycling strategies in order to minimize their pollutant discharges and reduce their potential liabilities.

In general, supplemental projects should be no more than 25 percent of the total settlement, exclusive of projected administrative costs.

#### **G. Oversight and Drafting Enforceable SEPs**

The settlement agreement should accurately and completely describe the SEP. It should describe the specific actions to be performed by the defendant/respondent, and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to the appropriate government agency or court. If an outside auditor is necessary to conduct this oversight, the defendant/respondent should be made responsible for the cost of any such activities in the settlement document. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official, and evidencing completion of the SEP, should be required.

The defendants/respondents should be required to quantify the benefits associated with the project and provide a report setting forth how the benefits were measured or estimated. The defendant/respondent should agree that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action.

Settlements should specify that enforcing agencies are entitled to oversee SEP implementation to ensure that a project is conducted pursuant to the provisions of the settlement. The settlement should specify the legal recourse if the SEP is not adequately performed to the agency's satisfaction whether the SEP is performed by the violator or a third party contractor. Government should not retain authority to manage or administer the SEP.

The type, scope, and timing of each project are determined in the signed settlement agreement. Settlements in which the defendant/respondent agrees to spend a certain sum of money on a project(s) to be determined later are not recommended, however on a case by case basis where it is impractical to include the specifics of a project because it is not identified or fully developed at the time of the settlement, the violator should be required to open an escrow account and place funds in the account prior to finalizing settlement. This account would then be utilized to finance the projects as they are developed.

If necessary, there should also be a commitment in the SEP for long term monitoring and upkeep of the SEP. For example, if the SEP requires the construction of a wetland, then there should be a continuing input of water to the wetland so it retains its wetland character.

Pollution prevention, reduction, or environmental restoration projects should be defined narrowly for purposes of meeting supplemental environmental project policy guidelines. They should only be eligible as supplemental projects if they are designed to reduce, prevent, or ameliorate the effects of pollution at the defendant/respondent's facility or environ, as appropriate.

A defendant/respondent's offer to conduct a study regarding they own facility and/or operations, without an accompanying commitment to implement the results should not be eligible for penalty reduction.

The enforcing agency has sole discretion to decide whether it is technically and/or economically feasible to implement the results. There should be a clause in the agreement specifying that the penalty "offset" will be rescinded and the final assessed penalty reinstated in full should the agency decide that the results can be implemented but the defendant/respondent is unwilling to do so.

The form of SEPs easiest to oversee and implement are those that require a donation to a third party made at the time settlement is entered into. More difficult are those that require defendant/respondent to carry on activity over a period of time. These SEPs can require significant staff time to oversee and may be difficult to enforce if difficulties re encountered.

#### **H. Failure of a SEP and Stipulated Penalties**

If a SEP is not completed satisfactorily, the defendant/respondent should be required pursuant to the terms of the settlement document, to pay stipulated penalties for its failure. The determination of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the defendant/respondent has made a good faith, timely effort to implement the SEP is at the sole discretion of the enforcing agency.

#### **I. Documentation and Confidentiality**

In each case in which a SEP is included as part of a settlement, an explanation of the SEP with supporting materials must be included as part of the settlement agreement. The explanation of the SEP should demonstrate that the criteria set forth herein are met by the project and include a description of the expected benefits associated with the SEP. Settlement agreements should not allow that documentation and explanations of a SEP are confidential.